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IN THE

# SUPREME COURT

## OF THE

## UNITED STATES

OCTOBER TERM, 1986

WATSON TOTUS, et al.,

*Petitioners,*

vs.

FRED HOLLY, et ux, et al.,

*Respondents.*

**BRIEF OF MUNICIPAL AND INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI**

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying the doctrine of *Ex Parte Young* and *Larson v. Domestic & Foreign Commerce Corporation* (which was applied by this Court to Indian tribal officials in *Santa Clara Pueblo v. Martinez*) to hold that the United States District Court had jurisdiction over Indian tribal officials in their individual capacty where the authority under which they acted was void.

2. Whether the Court of Appeals correctly held, after years of litigation, that it was futile to require respondent Water Users to exhaust tribal remedies when there were no tribal, civil or criminal proceedings pending, where the tribal remedies were controlled and subject to final determination by a Tribal Council which in promulgating the ordinance in question had already resolved the question of respondents' water rights adversely to respondents, and where the subject matter of the Water Code has, at least in part, been pre-empted by Congress.

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### ADDITIONAL TREATIES AND STATUTES

Pertinent portions of additional statutes cited are reprinted in Appendix at Page A-1 hereto.

### COUNTERSTATEMENT OF THE CASE

The centerpiece and focus of this litigation are the terms of Yakima Nation Water Code (the "Water Code") which was promulgated as Resolution No. 7-79-77 by the Yakima Tribal Council in May 1977 and became effective in 1978. A copy has been included in Appendix A to the Brief of Respondent State of

Washington in Opposition to Petition for Writ of Certiorari.

The Code purports to establish, by self-executing declarations of ownership and forfeitures, tribal communal ownership of rights to the use of all water on the reservation and to allocate rights to use of water on the basis of tribal discretion and racially discriminatory criteria without regard to the ownership of such rights by Indian or non-Indians. Adoption of the Code immediately clouded title to the water rights of land held by the individual and municipal respondents (who are non-Indian Water Users on the Yakima Indian Reservation or in the Glenwood Area, and are identified herein as "Water Users").

**LEGAL PROCEEDINGS.** This action for injunctive and declaratory relief was started in January 1978. The defendants moved immediately to dismiss on a number of grounds. (E.R.[1] 1, 3; C.R.[2] 22, 29) Before the District Court could rule, this Court issued its opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Water Users then amended their complaints to include as defendants, tribal officials in their individual capacities acting under void authority. (E.R. 42, 46, 48; C.R. 22, 29) The District Court ruled it lacked jurisdiction over the Tribe, the

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[1] "E.R." refers to the Excerpts of Record in the Court of Appeals.

[2] "C.R." refers to the Clerk's Record in the District Court.

Tribal Council and tribal officials in their official capacity by virtue of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § § 1301-1303, or any other statute. The District Court, nevertheless, held that suit against officials in their individual capacities was not barred by sovereign immunity. Petitioners' Appendix (herein "P. App.") D pp. 25a-32a.

The District Court also held then that the case was ripe for adjudication in that the actions of the tribal officials were sufficiently immediate and direct to permit adjudication, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967). P. App. D, p. 27a. The Tribal Council members have not continued to challenge that ruling.

In December 1978, before the effective date of the Water Code, Water Users sought and obtained injunctive relief against the application of the Water Code. (E.R. 93; C.R. 43, 47) That relief has been in effect almost continuously since then. P. App. H, p. 45a. (C.R. 54, 56, 86)

Later, the District Court granted the Water Users' motions for summary judgment on the ground that the Code was void. (E.R. 507; C.R. 34) It also ruled in favor of the Water Users on Tribal Council Members' contentions as to immunity and exhaustion of remedies. *Id.* On October 22, 1984, the Court of Appeals upheld the District Court Judge as to immunity and exhaustion of remedy, but reversed the District

Court's ruling that the Code was invalid because of its criminal sanctions. P. App. B, pp. 8a-11a.

On remand, the District Court again held that the authority under which the Tribal officials acted was void, but on the rationale that the Tribe did not have jurisdiction to regulate use of water over and above treaty reserved waters used by the Tribe and its members. P. App. C, pp. 12a-23a.

Tribal Council Members again appealed. The Court of Appeals on March 3, 1987, affirmed on the ground that the Tribal Council did not have the power to regulate excess water use by non-Indians on non-Indian fee land and that the Code was invalid to the extent it purported to bestow tribal civil regulatory authority over that use of excess waters. P. App. A, pp. 6a-7a.

This case has been pending before the Federal Courts over nine years. Throughout that entire period the Water Users' water rights have been clouded by the Water Code. At no time has the position of the Tribal Council Members as to all inclusive, exclusive Tribal ownership of all rights to use of all water on the reservation been changed by amendment of the Water Code or in any other substantial way. At no time have there been any proceedings pending before any tribal authority involving Water Users and the Water Code.

**THE RESERVATION.** The geographic and demo-

graphic setting in which the Water Code is to apply must be considered to understand the issues in this case.

The Yakima Indian Reservation is situated in the arid, eastern part of the State of Washington. Irrigation is required for the successful production of crops. The right to use of water is the principal component of value of land so irrigated.

The reservation has an area of 1,223,844 acres (about 1,900 square miles), exclusive of the Glenwood area. The Yakima River forms the northeastern boundary of the reservation. Some tributaries of the Yakima River border or rise in the reservation. Approximately two-thirds of the reservation is in the Yakima River Basin and one-third in the Klickitat River Basin. Ex. B to Statement. P. App. p. 43a. (E.R. 234, 236; C.R. 108)

**YAKIMA RIVER BASIN.** The Yakima Basin encompasses 6,062 square miles and includes approximately 475,000 irrigated acres. Waters for the irrigation of the basin come from the Yakima River and its tributaries. The natural flow of the basin has been enhanced by the Yakima Project developed by the United States Bureau of Reclamation, including large reservoirs located far from the reservation in the Cascade Mountains. The project distributes water throughout the basin to hundreds of thousands of acres including about 143,000 acres on the reservation. (E.R. 242; C.R. 111)

Six hundred thousand acre feet of water are diverted annually from the Yakima River to the reservation pursuant to Acts of Congress (August 1, 1914, Section 22, 63rd Congress, 2nd Sess., 38 Stat. 604, and July 1, 1940, 76th Congress, 3rd Sess., Ch. 496, 54 Stat. 707) and contract with the Bureau of Reclamation. These waters are distributed on the reservation by the Wapato Project (administered by the Bureau of Indian Affairs) to 80,124 acres held in trust for Indians and 63,371 acres held by non-Indians. (E.R. 242)

Ahtanum Creek, which forms the north boundary of the reservation and is in the Yakima River Basin, provides water to both Indians and non-Indians on the reservation and to non-Indians off the reservation. Both federal reserved rights and state law water rights are served. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *United States v. Ahtanum Irrigation District*, 330 F.2d 897 (9th Cir. 1964).

The surface waters of the Yakima River Basin are presently being adjudicated pursuant to the McCarran Amendment, 43 U.S.C. § 666, 66 Stat. 560, in a Washington State Court general water adjudication. *State of Washington, Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983). The United States has been joined as defendant in those proceedings in its own right and as trustee for the Tribe. *See*

*Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. U.S.*, 463 U.S. 110 (1983), *reh'g denied*, 464 U.S. 875; *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

**THE KLICKITAT RIVER BASIN.** About one-third of the reservation and the Glenwood area are in the Klickitat River Basin. The waters of this basin flow southerly to lands which are not claimed by the Tribe as part of the reservation and then into the Columbia River. Ex B to Statement. P. App. H, p. 43a. (E.R. 236)

**NON-INDIAN OWNERSHIP OF RESERVATION LAND.** Ownership of land in the irrigated portions of the reservation in the Yakima River Basin is a "checkerboard" of Indian and non-Indian ownership. *See Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). Ownership in the Glenwood area is predominantly non-Indian. *Id.* The 1,223,844 acre Yakima Indian Reservation (exclusive of the Glenwood area) includes 99,422 acres held in fee by non-Indians. For the most part the fee lands now held by non-Indians were transferred pursuant to the General Allotment Act, 25 U.S.C. § § 331 *et seq.*, 24 Stat. 388. P. App. H, pp. 42a, 43a.

Although the individual Water Users have asserted that the Glenwood area is not a part of the reservation, for the purposes of Water Users' motions for summary judgment only and no other purpose, it has been

assumed (without admitting the fact to be so) that the Glenwood area is a part of the reservation. The Water Code is asserted by petitioners (herein referred to as "Tribal Council Members") to apply equally to the reservation and the Glenwood area.

The Glenwood area was predominantly settled by non-Indians who received patents in the late 19th or early 20th Century under the Federal Homestead Laws on the assumption that the land was part of the public domain. P. App. H, pp. 41a-42a. The United States also granted 48,194 acres of land in this area in trust to the State of Washington. Act of February 28, 1889, 25 Stat. 676. (E.R. 288; C.R. 117) Subsequently, in the mid-20th Century, it was contended by the United States that this area is part of the reservation.

**A PREDOMINANTLY NON-INDIAN POPULATION.** The population of the reservation and the Glenwood area in 1980 was predominantly non-Indian. It totaled 25,363 of whom only 20% were Indian. In Toppenish, Wapato and the Glenwood area the population was approximately 10% Indian and 90% others. (E.R. 458-460; C.R. 129)

**NON-INDIAN USE OF EXCESS WATERS.** Water underlying, arising upon or flowing through or along the border of the reservation are being used by non-Indians both inside and outside of the reservation. P. App. H, p. 44a. On the reservation such use includes use by the State of Washington and by individual

non-Indians in the Glenwood area pursuant to claims under state law, permits granted by state law or certificates issued under State Court decrees. (E.R. 236; C.R. 108) The predominant use in the Glenwood area is by non-Indian Water Users. (E.R. 238-241, 244, 245; C.R. 109, 110, 112)

Waters in excess of those needed to satisfy tribal reserved water rights are available in both the Yakima and Klickitat River Basins. (E.R. 284-287; C.R. 116)

**THE WATER CODE.** Most significant for present purposes are four things which the Water Code expressly provides:

**1. Tribal Onwership of All Rights to Use of Waters.** It declares ownership by the Tribe of the rights and the use of all waters arising on, bordering, traversing or underlying the Yakima Indian Reservation. Code Preamble; Arts. I and III(6); pp. 1, 6, 7-8, 11; State Appendix A pp. 1, 4, 5, 6.

**2. Filing Required to Save Any Claim to Use of Water.** It requires all persons seeking to use water on the reservation to apply to the chairman of the Tribal Council, or lose the use of any claim for any right to use the water. Code Arts. IV, VIII, pp. 12, 15; State Appendix A pp. 8, 11.

**3. Temporary Use of Water Permitted.** It requires a permit (good for not more than ten years) for use of water within the reservation and prohibits use of water without such a permit. Arts. XIV(10), XV,

pp. 23, 24; State Appendix A pp. 18, 19. The permit is to be issued by the Water Resources Board appointed by the Yakima Nation Tribal Council. Arts. XIII, p. 19. State Appendix A p. 15. The Water Board must adhere to the policies set forth in the Code. Arts. II, XIV(4)(8), pp. 8, 9, 20-21, 22-23; State Appendix A pp. 5, 16, 18.

**4. Priorities to Use of Water Rest in the Discretion of the Tribal Council and are Racially Discriminatory.** It establishes a racially oriented system of priorities for the issuing of permits and use of water. No priority is allowed for the use of water by non-Indians on land that was not originally allotted to Indians. Arts. II, XIV, pp. 8-9, 20-22; State Appendix A pp. 5, 6, 16, 17. The highest priorities are for "tribal" or "public" uses and "tribal enterprise" established from time to time by resolution of the Tribal Council. Art. XIV(4)A,B, p. 21; State Appendix A p. 16. New priorities created by the Tribal Council may override priorities established by the Code or other Tribal Council action. Art. XIV(6), p. 22; State Appendix A p. 18.

**CONTINUING INVOLVEMENT OF THE OFFICIALS OF THE TRIBAL COUNCIL.** The chairman and other members of the Tribal Council continue to be involved after promulgation of the Water Code. Claims are to be filed with and acknowledged by its chairman. Art. IV, VII, pp. 12, 14-15; State Appendix A pp. 8,

10. The council may require more information from applicants and create new priorities at any time. Art. V, IX, XIV(6), pp. 13, 16, 22; State Appendix A pp. 8, 9, 11, 12, 18. It hears all appeals from decisions of the Water Resources Board. Its decision is final and unappealable. Art. XVII, pp. 24, 25; State Appendix A p. 20.

## SUMMARY OF ARGUMENT

1. The Court of Appeals applied the settled rules of *Ex Parte Young*, and *Larson v. Domestic & Foreign Commerce Corporation*, in the light of *Santa Clara Pueblo v. Martinez* to Yakima Indian Tribal officials in their individual capacities where the authority under which they acted was void. The decision of the Court of Appeals does not conflict with decisions of other circuits or the settled decisions of this Court.

The Water Code is invalid as to rights to use of water on lands acquired under federal public land law, as to rights to use of water on allotted lands (whether held by Indian allottees, Indian patentees of allotted lands or their non-Indian successors), and as to rights to non-Indian use of surface waters being adjudicated in the Yakima River Basin.

State law governs water rights on former public domain lands. Allotted lands patented to Indians or non-Indians have, by Act of Congress, become state law lands. Even Indian allottees residing on the reservation are by statute entitled to federal protection

of their rights to use their proportionate share of treaty reserved waters.

Tribal regulation of water rights subject to adjudication and administration in a pending Washington State Court general adjudication has been pre-empted by the McCarran Amendment. 43 U.S.C. § 666.

2. The Court of Appeals correctly held, after years of litigation, that it was futile to require respondent Water Users to exhaust tribal remedies when there were no tribal, civil or criminal proceedings pending, where any tribal remedies which might have been sought were controlled by and subject to final determination by a Tribal Council which, in promulgating the Water Code, had already resolved the question of ownership by respondent Water Users of water rights on the reservation adversely to Water Users, and where the subject matter of the Water Code has, at least in part, been pre-empted by Congress.

Ample authority may be found in the Acts of Congress and decisions of this Court to support the holding of the Court of Appeals as to the issue of abstention or exhastion of tribal remedies based upon recognized notions of equity and comity.

A. Where there were no pending Tribal Court or other proceedings, then the Federal District Court had a duty to hear this matter.

B. The Tribal Council has already resolved the issue of ownership by respondent Water Users of

rights to use of water on the reservation adversely to Water Users. It would be futile and improper to require Water Users to exhaust tribal remedies to reach a preordained conclusion.

C. The Water Code improperly attempts to regulate water rights which by Act of Congress have been committed to regulation by the State, or in the State Courts or, in some cases, by the federal government.

D. This case should not be sent back for further proceedings designed to exhaust tribal remedies, but which in reality would serve only to further protract this already unduly protracted litigation.

## ARGUMENT

**1. The Court of Appeals applied the well-established doctrine of the cases of *Ex Parte Young*, and *Larson v. Domestic & Foreign Commerce Corporation*, to Yakima Indian Tribal officials in their individual capacities where the authority under which they acted was void. It did so correctly under the recent decision of this Court in *Santa Clara Pueblo v. Martinez*.**

**A. The doctrine of *Young* and *Larson* applies to provide Federal Court jurisdiction over tribal officials in their individual capacities despite tribal immunity.**

The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) has been described as one of the three most important decisions of this Court. 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4231 (1978) at 352. Although it involves a fiction, the rule

of the case brings actions of state officials which might otherwise escape within the scope of federal judicial review. It subjects the states to constitutional restrictions which they might otherwise be able safely to ignore. *Id.* at 356, 357, 359. In perspective, the doctrine of that case seems indispensable to the establishment of constitutional government and the rule of law. *Id.* at 360. Basically, the doctrine permits the Federal Courts, notwithstanding the Eleventh Amendment, to enjoin state officers from acting unconstitutionally, either because their action violates the Constitution directly or is contrary to a federal statute that is the supreme law of the land. *Id.* § 4232 at 360.

Similarly, the rule of *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949), permits suits for specific relief against officers of the federal government acting outside the scope of their statutory authority or in an individual capacity. *See* 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3655 (2d ed. 1985) at 225. Furthermore, under the rule of *Larson*, sovereign immunity of the United States does not bar action against federal officers who have acted in their individual capacity, outside the scope of their authority, unconstitutionally or under unconstitutional authority. *Id.* § 3655 at 225-230.

In its recent decision of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) this Court recognized that the rule of *Ex Parte Young, supra*, required

consideration, separate from the immunity of the *Pueblo*, of the liability of a Pueblo officer to declaratory and injunctive relief.

The liability of tribal officials, like officials of the state and federal governments, in their individual capacity for actions without authority is well-settled in both reason and precedent.

**B. Petitioner tribal officials' authority to act is based upon the Water Code which is void within the meaning of the *Young*, *Larson* and *Martinez* cases.**

(1) The Water Code is invalid as to rights to use of water on lands acquired under federal public land law.

The statutory limitations on tribal power pertinent to the Court of Appeals decision arise out of acts adopted by Congress in the late 19th Century intended to further the national policy of the settlement of the arid west and fulfillment of the "manifest destiny" of the United States to stretch from sea to sea. These Acts were designed to provide incentives, generally in the form of land, for individuals to relocate and carve civilized communities out of the desert wilderness.

It is now well-settled that water rights for lands in the arid western states patented under the federal homestead laws are acquired and held under state law. Desert Land Act of 1877, 43 U.S.C. § § 321-323, 19 Stat. 377; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). These

non-navigable waters became subject to the *plenary* control of the desert land states. 295 U.S. at 163. "*The public interest in such state control in the arid land states is definite and substantial.*" 295 U.S. 142 at 165. *See also Cappaert v. United States*, 426 U.S. 128, 145 (1976).

Homesteaders and their successors (such as the Glenwood Water Users) have been held to have only Washington state law water rights. *United States v. Anderson*, 736 F.2d 1358, 1362, 1363 (9th Cir. 1984). Those rights are unquestionably appurtenant to the land where the water is beneficially used, pass upon conveyance to the grantee and are real property under Washington state law. Section 90.03.380 of Revised Code of Washington; *Drake v. Smith*, 54 Wn.2d 57, 61, 337 P.2d 1059 (1959); *Lawrence v. Southard*, 192 *Wash.* 287, 73 P.2d 722 (1937); *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933); *Tedford v. Wenatchee Reclamation District*, 127 Wash. 495, 221 Pac. 328 (1923).

The owners of these state law water rights are entitled to federal protection under 43 U.S.C. § 661.

Treaty reserved water rights encompass only that quantity of water needed to accomplish the purposes of the reservation and no more. *Cappert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978).

Years of peaceful use of water by non-Indians on

their own lands on the reservation establish the undeniable existence of excess waters which they have a right to use. The existence of treaty reserved water rights held by the Tribe or its members goes only to the priority, not the existence and ownership by non-Indians of state law water rights.

The Water Code, with its self-executing, communalization of all rights to use of water on the reservation, and its shifting and racially oriented priorities cannot stand against these vested state law water rights.

The Court of Appeals properly held that the Yakima Tribal Council lacked power to regulate the use of excess water by non-Indians on non-Indian fee land within the reservation and that the Water Code was invalid to the extent that it attempted to authorize such action.

(2) The Water Code is invalid as to rights to use of water on allotted lands whether held by Indian allottees or their non-Indian successors.

Although the decision of the Court of Appeals did not go so far, it is also clear that the Water Code is not valid as to rights to use of water on land held by Indian allottees, formerly allotted lands held by Indians in fee title or formerly allotted lands held by non-Indians in fee title (constituting the bulk of non-Indian ownership on the reservation).

Over the years Congress has vacillated between integration and separation in its policy toward Indians.

One result has been the checkerboard pattern of Indian and non-Indian population and ownership of irrigated land in the Yakima River Basin portion of the reservation noted in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). *See also Montana v. United States*, 450 U.S. 544 (1981). Non-Indians easily form the dominant ethnic group on the reservation. Substantial acreage on the reservation is owned by non-Indian successors to ownership of formerly allotted lands.

These patterns of population and ownership result from the General Allotment Act (also known as the Dawes Act), 25 U.S.C. § § 331 *et seq.*, 24 Stat. 388, adopted by Congress in one of its early "integration" phases February 8, 1887. The Act authorized tribal lands to be allotted in designated quantities to individual Indians. 25 U.S.C. § 331. Title was to be held in trust for each individual Indian allottee for a specified period of time then conveyed to the Indian or his heirs in fee discharged of the trust. 25 U.S.C. § 348, 31 Stat. 1085 (1901). Under Section 6 of the Act, as amended in 1906, after a fee patent has been issued, the property rights involved are governed by state law. 25 U.S.C. § 349, 34 Stat. 182; *Larkin v. Paugh*, 276 U.S. 431 (1928); *South Carolina v. Catawaba Indian Tribe*, ____ U.S. ____, 106 S. Ct. 2039, 2045 n.19 (1986). The fee patent, however, carries with it, as an appurtenance, its proportionate share

of the implied treaty water rights of the Tribe and its members. *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981), *appeal on remand*, 752 F.2d 397 (9th Cir. 1985) *petition for reh'g denied*, 758 F.2d 1324 (9th Cir. 1985) *cert. denied*, ___ U.S. ___, 106 S. Ct. 1183 (1986); *U.S. v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956) *cert. denied*, 352 U.S. 988; *U.S. v. Powers*, 94 F.2d 783 (9th Cir. 1938).

Even before patent is issued to allotted land, there is to be a just and equal distribution of water rights among the Indians residing on the reservation. Section 7 of the General Allotment Act, 25 U.S.C. § 381, 24 Stat. 390. Resident Indians, as holders of title to land in the reservation, are not to be deprived of those rights. *U.S. v. Powers*, 94 F.2d 783 (9th Cir. 1938) *aff'd*, 305 U.S. 527 (1938).

(3) The Water Code is invalid as to rights to non-Indian use of surface water in the Yakima River Basin.

Congress has historically deferred to administration of water rights by the western states. In the exercise of its plenary powers over Indian affairs Congress has, in addition, recognized and authorized administration of federal reserved water rights, including Indian treaty reserved water rights, by the

state courts in general water adjudications. 43 U.S.C. § 666, 66 Stat. 560 (also known as the McCarran Amendment); *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). This reflects a long-standing federal policy favoring unitary adjudication and administration of western water rights in state general water adjudication proceedings. The McCarran Amendment has given state courts concurrent and favored jurisdiction to both adjudicate and administer such federal reserved water rights as part of a unitary system for adjudicating and administering all water rights.

In the Yakima Basin a state court general adjudication, in which the United States has been joined in its capacity as trustee for the Yakima Indian Reservation, has been underway since 1977. *State of Washington, Department of Ecology v. Acquavella*, Yakima County, Washington Superior Court Cause No. 77-2-01484-5. *See State of Washington, Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983).

Congressional policies now and historically, favor establishment and protection of state law water rights and state court adjudication and administration of federal reserved water rights. Where the waters are being so adjudicated and administered, and flow both on and off of the reservation with substantial

off-reservation impacts, it is clear that the regulation of such waters is not a matter properly identified within the scope of the tribal self-government. The power of the Yakima Nation to regulate water use by non-members, if not all water users, in the Yakima basin which is being adjudicated in state court general water adjudication proceedings pursuant to the McCarran Amendment has been pre-empted. *Rice v. Rehner*, 463 U.S. 713 (1983).

**2. The Court of Appeals correctly held, after years of protracted litigation, that it was futile to require respondent Water Users to exhaust tribal remedies when there were no tribal, civil or criminal proceedings pending, where any tribal remedies which might have been sought were controlled by and subject to final determination by a Tribal Council which, in promulgating the Water Code, had already resolved the question of ownership by respondent Water Users of water rights on the reservation adversely to Water Users, and where the subject matter of the Water Code has been, at least in part, pre-empted by Congress.**

**A. Where there were no pending Tribal Court or other proceedings, then the Federal District Court had a duty to hear this matter. It was not premature for it to do so and abstention would have been improper.**

Tribal Council Members suggest that, after almost ten years of litigation before the Federal Courts and without any tribal proceedings pending against Water

Users at any time, it is premature for the Federal Court to dispose of this matter. They suggest, in effect, that a rule of abstention be applied.

The Tribal Council Members rely upon two recent decisions of this Court: *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. ____, 107 S. Ct. 971 (1987). These cases, respectively, involved assertion of federal question and diversity jurisdiction of the federal district courts. Each held that the District Court should have abstained from exercising its jurisdiction. In each, unlike the present case, the matter was already the subject of a pending Indian Tribal Court proceeding. In those cases considerations of comity were, predictably, held to direct that tribal remedies be exhausted in Tribal Court before the question was addressed by the Federal District Court.

The doctrine of abstention under which a District Court may decline to exercise or postpone the exercise of its jurisdiction is, however, an extraordinary and narrow exception to the duty of the federal district courts to adjudicate controversies properly before them. Abdication of the obligation to decide cases can be justified only in exceptional circumstances where the order to the parties to repair to the State Court would clearly serve an important countervailing interest. *County of Allegheny v. Frank Mashuda Com-*

*pany*, 360 U.S. 185, 196 (1959); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

By clear analogy, the considerations of comity, tribal sovereignty and self-government invoked by Tribal Council Members bring into play the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). When, as here, there is no pending tribal action, *Younger* principles and considerations of comity do not require exceptional circumstances to justify federal declaratory and injunctive relief against tribal statutes or ordinances. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930, 931 (1975).

**B. The Tribal Council has already resolved the issue of ownership of their rights to use of water on the reservation adversely to Water Users. It would be futile and improper to require them to exhaust tribal remedies to a preordained conclusion.**

In *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985), this Court stated that it did not suggest that exhaustion would be required where it would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. 105 S. Ct. at 2454, n.21. That is the case here.

At the heart of the Water User's contentions in this case is the attempt by the Tribe to usurp all rights to use of all waters on the reservation. The tribunal

of last resort for non-Indians seeking to challenge the Water Code is the Tribal Council. The Tribal Council has already at numerous places in the Water Code resolved the issue of ownership of rights to use of water in favor of an all-inclusive, communal tribal water right held and administered by it and made available for only temporary use according to a racially discriminatory set of priorities. The Water Board, which is the body designated to preside at initial hearings of matters under the Code, is bound to follow the principles established by the Tribal Council. Even the priorities set out in the Code by the Tribal Council are entirely subject to its discretion should it decide to recharacterize any use of water as a tribal or public use or a use for tribal enterprise. Water Code Art. XIV, A, B. Appendix A to State Brief p. 16. There is no appeal from the decisions of the Tribal Council. Although this litigation has dragged on for almost ten years, the Tribal Council has not revised the Code to change its position on ownership of the right to use of water even one iota.

It would be futile for the Water Users to pursue the question of the ownership of their water rights before either the Water Board or the Tribal Council. The Water Code, even if never interpreted by any Yakima Indian Tribunal other than the Tribal Council in adopting it, is not fairly subject to an interpretation which will render unnecessary or substantially modify

the federal question. It was the duty of the District Court to exercise its properly invoked jurisdiction. *City of Chicago v. Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77, 84 (1958); *Juidice v. Vail*, 430 U.S. 327, 339 (1977); *Gibson v. Berryhill*, 411 U.S. 564, 575-577 (1973); *Harman v. Forssenius*, 380 U.S. 528, 534, 535 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Zwickler v. Koota*, 389 U.S. 241, 247, 248, 251 (1967):

> Any other course would impose expense and long delay upon litigants without hope of its bearing fruit . . . abstention cannot be ordered simply to give state courts the first opporunity to vindicate the federal claim.

389 U.S. at 251.

**C. The Water Code improperly attempts to regulate water rights which by Act of Congress have been committed to regulation in the State or Federal Courts.**

In *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985), this Court stated that it did not suggest that exhaustion would be required where the action was expressly violative of express jurisdictional prohibitions. 105 S. Ct. at 2454 n.21. In this case Congress has, in essence, pre-empted Tribal regulation of the use of water rights by the Water Users. It is inappropriate to require abstention or exhaustion of tribal remedies as to rights to use of water on lands owned by non-Indians and acquired from the public domain under federal laws such as the

homestead laws; as to rights to use of water on formerly allotted lands held in fee by Indians or non-Indians; as to rights of Indian allottees on the reservation to a just and equitable distribution of treaty reserved water rights; and as to rights to use of surface water which are subject to adjudication and administration in the pending State Court general adjudication. See Part 1.B(1)(2) and (3) of this argument, *supra* at p. 15.

**D. This case should not be sent back for further proceedings designed to exhaust tribal remedies, but which in reality would serve only to further protract this already unduly protracted litigation.**

This case has been before the Courts almost ten years. Tribal Council Members suggest that it should be started all over again. Presumably, the parties would face hearings before the Water Board, the Tribal Council, the Federal District Court, the United States Court of Appeals and, possibly, this Court before the question of their ownership of their water rights would be resolved. Throughout that time valuable rights to use of water and land values would remain clouded.

Parties should not be remitted to the state courts for further proceedings where the litigation has been protracted, remission would further protract the proceedings, valuable rights might be lost and it is unlikely that the outcome would change. *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Harris County*

*Commissioners Court v. Moore*, 420 U.S. 77, 83, 84 (1975).

## CONCLUSION

The decision of the Court of Appeals was correct. Application of the doctrine of the *Young*, *Larson* and *Martinez* cases to tribal officials acting without authority creates no conflicts with the decisions of this Court or other courts of appeal, and is as necessary and permissible as it is to state and federal officials.

Under Acts of Congress and decisions of this Court the self-executing application of the Water Code to the Water Users and others, clouding valuable property rights, was without authority and void. Relief against the Tribal Council Members was proper.

Neither the Court of Appeals nor the Federal District Court acted prematurely. Unlike the *National Farmers Union* and *LaPlante* cases relied upon by the Tribal Council Members, this case is not a proper case for abstention.

This case raises no important questions of federal law which should be settled by this Court at this time. There is no conflict with the decisions of this Court, nor other Court of Appeals, and no serious departure from the accepted and normal course of judicial proceedings.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July 28, 1987

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# APPENDIX

## Federal Statutes

25 U.S.C. § 331, 24 Stat. 388 in pertinent part provides:

> **Allotments on reservations; irrigable and nonirrigable lands**
>
> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: . . . .

25 U.S.C. § 348, 31 Stat. 1085 in pertinent part provides:

> **Patents to be held in trust; descent and partition**

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: . . . .

25 U.S.C. § 349, 34 Stat. 182 in pertinent part provides:

**Patents in fee to allottees**

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: . . . *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: . . . .

25 U.S.C. § 381, 24 Stat. 390 in pertinent part provides:

**Irrigation lands; regulation of use of water**

In cases where the use of water for irrigation is necessary to render lands within any Indian

reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

43 U.S.C. § 321, 19 Stat. 377 in pertinent part provides:

> **Entry right generally; extent of right to appropriate waters**
>
> [T]he right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. . . . .

43 U.S.C. § 322, 19 Stat. 377 in pertinent part provides:

> **Desert lands defined; qustion how determined**
>
> All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of sections 321 to 323, 325, and 327 to 329 of this title, which fact shall be ascertained by proof of two or more credible

witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

43 U.S.C. § 323, 19 Stat. 377 in pertinent part provides:

> **Application to certain States**
>
> Sections 321 to 323, 325 and 327 to 329 of this title shall only apply to and take effect in the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota.

43 U.S.C. 661, 14 Stat. 253, 16 Stat. 218, 90 Stat. 2793 in pertinent part provides:

> **Appropriation of water on public lands; rights of way for canals and ditches**
>
> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . . .

43 U.S.C. § 666, 66 Stat. 560 in pertinent part provides:

> **Suits for adjudication of water rights**
>
> **(a) Joinder of United States as defendant; costs**
>
> Consent is hereby given to join the United States as defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring

water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

**Washington Statutes**

RCW 90.03.380 in pertinent part provides:

**Right to water attached to land — Transfer or change in point of diversion.** The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used.